MAY 31 2001

Nos. 00-568 & 00-809

Supreme Court, U.S.
FILED
MAY 31 2001
CLERK

IN THE

Supreme Court of the United States

PEOPLE OF THE STATE OF NEW YORK AND THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

ENRON POWER MARKETING, INC.,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF RESPONDENT EDISON ELECTRIC INSTITUTE

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QUESTIONS PRESENTED

Section 201(b) of the Federal Power Act ("FPA") grants the Federal Regulatory Energy Commission ("FERC") jurisdiction over "the transmission of electric energy in interstate commerce" and "the sale of electric energy at wholesale in interstate commerce" but not over "any other sale of electric energy." The questions presented are:

1. Whether FERC correctly concluded that it has jurisdiction under FPA § 201(b) over interstate transmission service that has been unbundled and sold separately from the sale of electric energy to a retail customer?

2. Whether FERC correctly concluded that it lacks jurisdiction under FPA § 201(b) over interstate transmission provided as part of a sale of electric energy in a single, bundled transaction with a retail customer?

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OPINIONS BELOW

The opinion of the court of appeals is reported at 225 F.3d 667. Pet. App. 3a-121a.[1] The pertinent orders of the Federal Energy Regulatory Commission ("FERC"), Order No. 888 and Order No. 888-A, are reported at 61 Fed. Reg. 21,540 and 62 Fed. Reg. 12,274, respectively. Relevant portions also appear at Pet. App. 125a-369a and 371a-551a.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 2000, and the petitions for rehearing were denied on August 22, 2000. Pet. App. 3a, 123a-124a.

The petitions for a writ of certiorari were filed on October 12, 2000 and November 20, 2000, and were granted on February 26, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1994).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Sections 201(a)-(d), 212(h), and 313(b) of the Federal Power Act of 1935 ("FPA"), 16 U.S.C. §§ 824(a)-(d), 824k(h), 825*l*(b) (1994); and Sections 1(a), (b), and 7(c) of the Natural Gas Act ("NGA"), 15 U.S.C. §§ 717(a), (b), 717f(c) (1994); and 18 C.F.R. § 35.28 (2000) (the open access regulation) are reproduced in relevant part in an appendix to this brief. App., *infra*, 1a-8a.

STATEMENT OF THE CASE

The Nation's electric industry is in transition. Over the past decade, FERC has opened the market for wholesale electric power sales to competition. In addition, in many states, the traditional industry model of a single vertically-integrated firm providing retail service to a customer has

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[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari filed by Enron Power Marketing, Inc. ("Enron") in No. 00-809.

given way to competition for the supply of electric energy to retail customers. In order to permit such competition, states have ordered or permitted utilities to "unbundle" their transmission services—to sell retail transmission service independently of electric energy. FERC's issuance of Order No. 888 was a keystone event in this transition, prescribing uniform rules of access to transmission in wholesale energy markets and in those retail markets in which the states have permitted competition for electric energy.

Respondent Edison Electric Institute ("EEI") submits this brief in support of FERC's decision on the jurisdictional issues in Order No. 888. FERC concluded that it possessed exclusive jurisdiction over interstate transmission service that has been unbundled from a retail sale of energy, but lacked jurisdiction over transmission that was a component of a bundled retail sale. This interpretation has been challenged both for overreaching and for failing to assert jurisdiction granted by Congress.

EEI urges this Court to reject both attacks. Order No. 888 represents a sound construction of the language of the Federal Power Act. Retail transmission sold separately from energy falls within the statutory grant of jurisdiction for "the transmission of electric energy in interstate commerce," while a transmission sold as part of a sale of energy to retail customers falls within its exception for "any other sale of electric energy." 16 U.S.C. § 824(b)(1). This interpretation protects service to retail customers in states that follow the traditional model, while ensuring that competing energy suppliers receive equal access to transmission facilities in states that have opened retail markets to competition. It is well suited to a nation in which different states are following different courses with respect to retail competition.

I. BACKGROUND

A. Edison Electric Institute

EEI is the national association of U.S. shareholder-owned electric companies, their affiliates and industry associates worldwide. Its members are located in forty-nine States and the District of Columbia. EEI's members serve over ninety percent of all customers served by the shareholder-owned segment of the industry. They generate approximately three quarters of all the electricity generated by electric companies and serve about seventy percent of all retail customers in the nation. EEI members own approximately seventy percent of all transmission facilities in the country.

EEI members participate in all aspects of the restructured electric industry. EEI members include companies that provide traditional bundled service under an obligation to serve retail customers and companies operating in states that have adopted retail competition. Some EEI members are vertically integrated, some have separated their generation, transmission and distribution into separate business units or affiliates, and others have divested portions of their electric businesses. All EEI members are public utilities subject to FERC jurisdiction, and they provide open access transmission service over their transmission facilities as required by Order No. 888. Many EEI members participated in the proceedings below and were named as respondents in the petitions for certiorari.

B. Changes in the Retail Electric Industry

When Congress enacted the Federal Power Act in 1935, there was no such thing as unbundled retail transmission service. In 1935 and for many decades thereafter, the vast majority of electric service to consumers was provided by vertically-integrated utility companies subject to state regulation. Pet. App. 28a, 141a. Their service combined generation with delivery of electric power into a single bundled service. Pet. App. 9a, 27a, 141a. The retail

customer had no choice among providers, and the rates, terms and conditions of the delivered service were fully regulated by the States. Pet. App. 28a, 30a. As of this time, many states have retained the traditional model of the franchised utility as the preferred means of providing quality service to their retail customers.

In the past decade, however, a number of states have decided to open their retail markets to competition among energy suppliers. Pet. App. 132a. As a critical first step, they have directed or permitted the utilities in their jurisdiction to provide transmission service independently of energy. This enables other potential suppliers of energy to purchase the transmission service for use in selling their own energy to retail customers. This unbundling of transmission service represents a paradigm shift from the franchised, vertically-integrated utility to a competitive marketplace in which different firms seek to provide different aspects of electric service directly to retail customers. And it has transformed the primary role of regulation from supervising the rates, terms and conditions of bundled service to assuring that competition among energy suppliers for the same retail customers takes place under fair conditions.

C. Changing Uses on The Interstate Grid

The role of the interstate grid has also changed dramatically in recent years. Traditionally, utilities built transmission lines for the benefit of their own customers and with funds supplied by those customers. Pet. App. 28a, 141a. Their principal purpose was to transmit power from nearby sources of generation and within their retail service areas. *Id.* Gradually, utilities began interconnecting their systems permitting the exchange of electric energy in a wholesale market, but until relatively recently these exchanges usually involved transactions between the utilities themselves.

Since the enactment of the Federal Power Act, electric utilities have constructed thousands of miles of high voltage transmission lines linking ("interconnecting") their systems across state lines. Pet. App. 10a, 147a. These interconnections were created to coordinate operations and thereby enhance the reliability of the utilities' systems, as well as to engage in sales of electric energy with each other. *See Gainesville Utils. Dep't v. Florida Power Corp.*, 402 U.S. 515, 520-24 (1971); Pet. App. 10a, 141a, 147a. They were also constructed to enable utilities to participate jointly in large generating projects located at a distance from the utilities' service territories. Pet. App. 147a. Over the past three decades or so, this construction has produced highly integrated regional transmission networks over which electric power flows freely between systems and across state lines. *Id.*

Although the interstate transmission grid consists primarily of transmission lines planned and built by individual utilities, in many respects the grid functions like a reservoir full of water: "a given amount of power enters the system at one point and a like amount is delivered at another point." *Fort Pierce Utils. Auth. v. FERC*, 730 F.2d 778, 782 (D.C. Cir. 1984). The original producer of electrons has no control over them after they enter the transmission grid because they commingle with other electrons from different sources. Even though each increment of production by a given generator expands the supply of energy available to meet demand on the electric system, the electrons added to the interstate grid by a particular generator will not necessarily be those that reach his buyer.

As one petitioner aptly put it in the proceedings below: "electrons do not respect State boundaries."[2] Electrons

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[2] Request of the National Association of Regulatory Utility Commissioners for Rehearing of Order No. 888, at 9 (May 4, 1996) (FERC Docket Nos. RM95-8-00 and RM94-7-001).

follow the laws of physics, rather than contract rights or regulatory law. On the interconnected AC network, electrons disperse onto the various available transmission lines, and electrons seek the path of least electrical resistance under Ohm's law. The configuration of regional generation use, available transmission lines and the location of electrical loads all affect the pattern of flows on the interconnected grid. Thus, such patterns of flow are complicated, dynamic and not necessarily congruent with the contractual path of an identified transaction.[3] Through these multiple, indirect paths, the grid moves energy in bulk quantities over significant distances and from one local area to another.

The "local distribution facilities" of electric utilities are different. These facilities operate at lower voltages and do not transfer large quantities of electricity for long distances across broad geographic regions. Pet. App. 350a-351a, 368a. Rather, utilities own and operate "substations" at which power is received from high voltage transmission lines, voltages are reduced ("stepped down"), and power is then sent into the lower capacity distribution lines for delivery to end-use consumers. Pet. App. 350a-351a, 360a. Distribution facilities typically operate like appendages to the transmission system, with power flowing radially out from the transmission grid to ultimate consumers. As defined by the Commission, local distribution facilities are typically those into which power may enter but from which it does not exit.

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[3] *See* Comments of North Carolina Utilities Commission at 4 n.2 ("[T]he actual path taken by electric power flow across a transmission system is difficult to predict. Because of its interconnection with neighboring systems, a transmission system typically consists of a number of possible paths between any two points. . . [T]he actual flow of electricity typically diverges significantly from the contract path, with the result that the supposed economics of the contract path frequently have little to do with the actual cost of the power transfer.") (Aug. 10, 1995) (Order No. 888 Rulemaking Proceedings, FERC Docket Nos. RM95-8-00 and RM94-7-001).

Pet. App. 36a n.6. Thus, power flows in a distribution facility rarely have a material impact on transmissions of electricity in bulk quantities on the interstate grid.

II. RESTRUCTURING OF THE ELECTRIC INDUSTRY

By the 1970s, some electric industry participants began looking at interstate transmission as a means of enabling them to compete in the supply of electric power at the wholesale level. Pet. App. 10a, 29a. In 1978, as a response to the energy crises of the 1970s, Congress enacted the Public Utilities Regulatory Policy Act, Pub. L. No. 95-617, 92 Stat. 3117 (1978) ("PURPA"). PURPA spawned the development of a new, non-utility generation industry that began demanding access to the interstate transmission grid in order to compete with utility-owned generation.

In 1992, Congress enacted the Energy Policy Act, Pub. L. No. 102-486, 106 Stat. 2776 (1992) (EPAct), which expanded FERC's authority to order utilities to provide interstate transmission service as a separate unbundled product. However, Congress expressly limited this authority to ordering "wholesale" transmission services, thereby preserving to the States the authority to continue regulating bundled retail services, and to choose whether and under what terms competition for retail sales of electric energy might be permitted. To this end, Congress expressly prohibited FERC from ordering wheeling directly to an end-user and prohibited sham transactions designed to circumvent the ban on mandatory retail wheeling. 16 U.S.C. § 824k(h).

A. Order No. 888

By 1995, the competitive market for wholesale power had evolved to the point that FERC perceived a risk that transmission-owning utilities could favor their own merchant activities (*i.e.*, wholesale power transactions) by offering transmission services to competitors on discriminatory

terms. Pet. App. 557a-559a, 566a. In Order No. 888, FERC ordered every transmission-owning public utility subject to its jurisdiction to file an open access transmission tariff with uniform terms and conditions of service under which it would supply transmission both for its own wholesale transactions and for those of its competitors. Pet. App. 133a-134a.

Further, FERC determined that where interstate transmission was provided to retail customers separately from a sale of energy, it would also be subject to the open access tariff, thereby ensuring that such services would be provided on a non-discriminatory basis to competing energy providers. Pet. App. 136a, 305a. However, the Commission did not apply its open access transmission requirements to state-regulated, bundled retail electric sales, which are not supplied in a competitive market. Pet. App. 306a. Rather, consistent with the Energy Policy Act, it respected the right of individual states to decide whether retail services should be unbundled to permit competition for such services and, absent such competition, allowed the states to continue to regulate all components of bundled retail service. Pet. App. 305a-306a.

Even with respect to unbundled retail transmission services, Order No. 888 specifically preserved state jurisdiction over local distribution facilities used to deliver energy to end-users. Pet. App. 282a-283a, 310a-312a. FERC proposed seven physical characteristics that could be used to distinguish such distribution facilities from electric transmission.[4] As a matter of process, FERC said that public

[4] The seven indicators of local distribution are: (1) close proximity to retail customers; (2) radial design; (3) inflows are common, outflows are rare; (4) power is not reconsigned or transported on to other markets; (5) power is consumed in a comparatively restricted geographical area; (6) meters measure flows at the interface between transmission and local distribution; and (7) distribution systems feature reduced voltage. Pet. App. 282a-283a.

utilities must consult with their state regulatory authorities before petitioning FERC for a ruling on the proposed classification and that FERC would defer to state recommendations on where to draw the line. Pet. App. 312a.[5]

The Commission also addressed in Order No. 888 various issues relating to the rights of different entities to access the grid when transmission capacity is insufficient to handle all of the competing transactions. Pet. App. 264a-274a. It permitted utilities to reserve sufficient transmission capacity on their systems to serve reliably their bundled retail service customers, the so-called "native load." However, it also established requirements concerning the calculation of remaining available transmission capacity ("ATC"), which would be utilized to establish the quantity of capacity available for customers under the open access tariffs. Order No. 888, 61 Fed. Reg. 21,540, 21,574-75 (May 10, 1996); Pet. App. 267a-72a. Further, FERC asserted authority to review such determinations of ATC, including the "set-aside" for bundled retail service (*i.e.*, for "native load"), to ensure that transmission capacity would not be withheld arbitrarily from the open access market. Order No. 888-A, 62 Fed. Reg. 12,274, 12,301 (Mar. 14, 1997); *see also* note 42 *infra*. In addition, once a utility determines that sufficient ATC exists to provide service under the open access regime, the priority rules established in Order No. 888 mandate the same level of "firmness" to open access transmission customers in comparison with bundled retail customers. Pet. App. 269a-270a.

B. Decision of the Court of Appeals

The court of appeals upheld FERC's conclusions with regard to jurisdiction. It agreed with FERC that the definition

[5] Since the promulgation of the final rule in 1996, FERC has not overruled any state commission recommendation with respect to the extent of local distribution.

of interstate transmission in FPA § 201(c), as construed by this Court's decisions, was broad enough to provide jurisdiction over retail as well as wholesale transmission. Pet. App. 35a. Thus, the court of appeals rejected New York's argument that FERC lacked jurisdiction over unbundled retail transmission.

The court also agreed with FERC that FERC was not required to mandate unbundling and assert jurisdiction over all retail transmissions. "Just as FPA Section 201 gives FERC jurisdiction over transmissions in interstate commerce and sales at wholesale, the statute also clearly contemplates state jurisdiction over local distribution facilities and retail sales." Pet. App. 35a. In the court's view, "[a] regulator could reasonably construe transmissions bundled with generation and delivery services and sold to a consumer for a single charge as either transmission services in interstate commerce or as an integral component of a retail sale." *Id.* The Court upheld FERC's decision to characterize a bundled transmission as part of a retail sale as a "statutorily permissible policy choice." *Id.*

Finally, the court rejected New York's argument that the seven-factor test used for identifying local distribution in the context of retail transmissions should also be used for wholesale transmissions. The court held that the FPA gave FERC jurisdiction over all aspects of a wholesale transmission, regardless of the facility involved. Pet. App. 38a-39a.

C. State Unbundling Following Order No. 888

At the time FERC issued Order No. 888, no state had fully unbundled retail service, permitting competition for retail customers. In a few states, there were limited experiments permitting large customers to seek alternative suppliers. Following Order No. 888, a significant number of states enacted legislation or rules mandating the unbundling of retail

services.[6] All of these states were aware of the jurisdictional implications of Order No. 888, and in some cases specifically referred to it in the retail access legislation.[7] Other states have declined to embrace retail competition, or have chosen to defer its implementation.

SUMMARY OF THE ARGUMENT

Order No. 888 respects the division of federal and state authority drawn by Congress in the FPA, while taking into account the changes that have taken place since the Act was enacted. It protects the legitimate interests of retail customers who depend upon a single utility providing traditional retail service, while ensuring fair access to transmission facilities in those markets where the supply of electricity has become the subject of competition, often on an interstate basis. Because Order No. 888 is soundly based in the language of the FPA and consistent with its objectives, it should be affirmed.

Both sets of challengers proceed on the same core assumption that unbundling is merely an artificial accounting convention and, from that premise, reach opposite conclusions. Both are wrong. Unbundling represents a fundamental change in the way that utilities do business, with important legal and economic implications. From a legal perspective, the unbundling of transmission means that transmission is sold in commercial transactions separate from

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[6] States that have ordered retail competition include: Arizona, Arkansas, California, Connecticut, Delaware, Illinois, Maine, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Pennsylvania, Oklahoma, Oregon, Rhode Island, Texas, and Virginia. Current information about the status of various state retail programs, as well as some corresponding citations, may be found at www.eia.doe.gov/cneaf/electricity/chg_str/tab5rev.html.

[7] *See, e.g.*, Okla. Stat. Ann. Tit. 17 § 190.2; *see also* Brief of Amici Curiae State of California at 1 (admitting that California made its choice regarding retail competition knowing FERC's position on the jurisdictional issue).

the sale of electric energy. From an economic perspective, unbundling is a means of introducing competition into an electric market, and thereby creates a need for rules to prevent discrimination against competitors seeking to enter that market. Order No. 888 recognizes the significance of these distinctions, while reasonably characterizing traditional bundled transmission service as integral to a retail sale of energy and hence outside the Commission's jurisdiction.

New York and its allied petitioners ("New York") question whether retail transmission involves interstate commerce. However, the Commission relied on settled law and universally accepted scientific fact when it posited that retail transmission over the interconnected grid would be "in interstate commerce." 16 U.S.C. §§ 824(b), (c). New York failed to challenge that point before the Commission and failed to raise in the court of appeals the largely factual issues that it presents here. This case must therefore be decided on FERC's premise that its rule was directed at interstate transmission.

FERC's rule accords with FPA § 201(b), which grants federal jurisdiction over interstate transmission without a limitation to wholesale transactions. It therefore encompasses transmission service to retail customers when that service is sold separately from energy. Indeed, this intent is confirmed by the wording of the proviso to § 201(b), which excepts only "any other sale of electric energy." A separate sale of unbundled transmission service is not a "sale of electric energy." 16 U.S.C. § 824(b).

New York relies heavily upon FPA § 201(a), but that declaration of policy does not override the express grants of jurisdiction in the statute. Moreover, by its own terms, § 201(a) does not apply here. At most, this section states an intention to preserve for the States their jurisdiction over matters that they were regulating at the time of enactment. These did not, of course, include interstate transmission

divorced from retail sales. Indeed, "direct" state regulation of interstate transmission independent of a retail transaction would likely have been viewed as unconstitutional. Thus, such jurisdiction was not saved, and certainly was not granted, by § 201(a).

New York quotes extensively from the legislative history of the FPA. To the extent that such history is meaningful at all, it confirms that Congress intended to save for the states their "pre-existing jurisdiction," which involved bundled retail sales. It also shows an intent to have federal jurisdiction fill any gap that was created by constitutional limitations on state jurisdiction over interstate transmission—limitations that were already apparent at the time of enactment. Thus, FERC has acted in conformity with congressional intent when it has assumed jurisdiction over transmission facilities used in the new competitive interstate markets created by state restructuring.

Finally, New York cannot rely on a presumption against federal preemption of the States' traditional police powers. The question of whether FERC has authority over unbundled sales of transmission is not a question of preemption but rather of jurisdiction. Questions of agency jurisdiction are determined by its organic statute, without reference to presumptions. This is especially true with respect to the FPA, which contains its own detailed jurisdictional provisions. Thus, this Court has never referred to presumptions in analyzing those provisions.

Amici California and California Public Service Commission ("California") seek reversal on completely different grounds, contending that all retail transmission falls within § 201(b)'s exemption for "local distribution." This argument is not properly before the Court because it was not presented to the Commission, to the court of appeals or to this Court in the petition for certiorari. In fact, petitioner New York actually endorsed the use of the seven-factor test announced

by the Commission as the means of identifying which facilities are involved in "local distribution."

In any event, FERC's interpretation is faithful to the language of this provision and the governing case law. There would be no point in an exemption for "any other sale" if local distribution covered all retail sales. "Local distribution" has a narrower meaning, consistent with pre-enactment case law that identified "local distribution" as occurring when gas pressure or voltage was reduced for purposes of retail delivery. Post-enactment case law has confirmed that the identification of "local distribution" facilities is a question of fact to be decided by the Commission. The Commission's use of a seven-factor test to identify such facilities has not been shown to be arbitrary or capricious. Thus, this exception does not remove all retail transmission from FERC's jurisdiction.

Enron, seeking federal jurisdiction over transmission for bundled retail sales, contends that § 201(b) of the FPA "gives FERC jurisdiction, without any stated limitation or qualification, over all interstate transmissions of electric energy." Brief of Enron in No. 00-809 ("Enron Br.") at 21. This argument, however, ignores both the "any other sale" proviso of § 201(b)—specifically excluding retail sales of power from FERC jurisdiction—and the six decades of history leaving to the States jurisdiction over any transmission sold as part of the retail power sale. Congress has amended the FPA on several occasions, but has not altered this allocation of responsibility.

Enron relies for support almost exclusively on case law under the Natural Gas Act. This case law is not dispositive, since the natural gas industry developed along different lines than the electric industry. From the outset, natural gas was transported by interstate pipelines owned by different companies than were responsible for production and distribution. Congress sought to place this separate interstate

transportation function under federal control by adopting a certification requirement in § 7(c) of the NGA, which has no counterpart in the FPA. In order to give effect to the Commission's powers under § 7(c), the courts adopted a broad construction of the jurisdictional provisions of the NGA, giving the Federal Power Commission ("FPC") authority to regulate transportation in connection with direct industrial sales.

The natural gas cases, which are rooted in the history and structure of the NGA, do not establish that FERC's interpretation of the FPA was unreasonable. The FPA has its own distinctive history, which has left the regulation of all aspects of bundled retail sales to the States. In this light, it was reasonable for FERC to conclude that transmissions bundled with retail sales are outside of its jurisdiction. FERC's reasonable interpretation deserves judicial deference.

Finally, Enron makes a policy argument that FERC jurisdiction over bundled retail sales is needed to combat discrimination by transmission-owning utilities against their competitors. However, Enron fails to acknowledge that, in states where only bundled service is provided, there is no competition for retail customers. Moreover, there is no discrimination when a utility with an obligation to serve reserves transmission capacity to serve its native load customers. Insofar as Enron and its *amici* are complaining that some utilities may have over-reserved capacity, FERC has authority under Order No. 888 to review and remedy such abuses.

ARGUMENT

I. FERC LAWFULLY ASSUMED JURISDICTION OVER UNBUNDLED INTERSTATE TRANSMISSION SERVICE PROVIDED TO RETAIL CUSTOMERS.

The Commission's conclusion that it had jurisdiction over the transmission component of an unbundled retail sale rests

directly on the language of the Federal Power Act. Its reasoning proceeds in two simple steps.

First, the Commission has jurisdiction over the transmission of electricity in interstate commerce. Transmission of electric energy to retail customers over the interconnected grid is interstate. Thus, unless a specific exception within the statute prevents the Commission from exercising that jurisdiction, the Commission has power to regulate such transmission.

Second, there is no exception in the language of § 201 that would prevent the Commission from assuming jurisdiction over interstate transmission that is unbundled from a retail sale. To be sure, the Commission does not have jurisdiction over a retail "sale of electric energy" under the proviso of § 201(b). However, the separate sale of transmission service is *not* a sale of electric energy and hence does not fall within this exception. Thus, the Commission has soundly concluded that it has jurisdiction over all forms of unbundled, interstate transmission.

A. The Rule Properly Applies to Transmission in Interstate Commerce.

As the court of appeals pointed out, "[b]oth FPA § 201(a) and (b) clearly and unambiguously confer upon FERC jurisdiction over the 'transmission of electric energy in interstate commerce.'" Pet. App. 32a. Consistent with these provisions, in Order No. 888, the Commission applied its rule only to "the transmission of electric energy in interstate commerce . . . ." 18 C.F.R. § 35.28(c)(2) (2000). In the course of the rulemaking proceeding, moreover, the Commission explained that retail transmission on the interconnected grid generally falls within this phrase:

> The term does not turn on whether the contract path for a particular power or transmission sale crosses state lines, but rather follows the physical flow of electricity. Because of the highly integrated nature of the electric system, this results in most transmission of electric energy being "in interstate commerce."

Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Notice of Proposed Rulemaking, 59 Fed. Reg. 35,274, 35,284 (July 11, 1994). The only exceptions, the Commission later noted, were the purely intrastate transmission systems in Alaska, Hawaii and an isolated portion of Texas. Pet. App. 305a n.541.

The Commission had no need to say more regarding the scope of interstate transmission since it was already settled, both as a matter of law and of fact, that transmission on the interconnected grid was interstate in nature. This Court had repeatedly held that transmission was interstate if any portion of the electrons involved in the transmission originated out of state or departed for another state. *E.g., FPC v. Florida Power & Light Co.*, 404 U.S. 453, 463 (1972); *Connecticut Light & Power Co. v. FPC*, 324 U.S. 515, 529 (1945) ("Federal jurisdiction was to follow the flow of electric energy, an engineering and scientific, rather than a legalistic or governmental, test."). It was also consistent with the Commission's technical understanding that electrons on an interconnected grid do not move in conformity with contractual arrangements, but rather follow the path of least resistance.[8] Thus, the Commission assumed that a rule directed at the "transmission of electric energy in interstate commerce" would necessarily encompass retail transmissions on the interconnected grid.

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[8] *See* Pet. App. 612a n.144 ("[I]n reality power flows are rarely confined to a designated contract path . . . . [T]he laws of physics . . . cause power . . . to travel along multiple parallel paths and divide itself among those paths along the lines of least resistance.") (citation and quotations omitted).

New York now apparently seeks to challenge that view.[9] It argues that such retail transmission must be intrastate because "most retail electricity transactions involve generators and consumers that are not only in the same state, but in proximity." Brief of New York in No. 00-568 ("NY Br.") at 37. Then it offers an interpretation of § 201(c) that transmissions are not interstate if they are between buyers and sellers in the same state. *Id.*

To the extent that the generalizations in the Commission's preambles are reviewable at all,[10] New York has failed to present its contentions in a timely fashion. New York failed to challenge the factual adequacy of the rulemaking record in any of the proceedings below. It did not argue before the Commission that the record lacked substantial evidence to support the premise that retail transmission over the interconnected grid could be "in interstate commerce." Nor did it make that contention in the court of appeals.

Under these circumstances, New York has waived the attack it presses here. Under § 313(b) of the Federal Power Act, New York was required to raise that issue before the Commission in its petition for rehearing prior to court review. 16 U.S.C. § 825*l*(b) ("No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the

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[9] New York's presentation of this issue is, at best, equivocal. The question in its petition referred to "transmission of energy from generators to retail customers *in the same state*" and to "intrastate" retail transmission, New York Pet. for Cert. at i. However, the question in New York's merits brief does not have either reference. Brief of New York in No. 00-568, at i.

[10] *See Kennecott Utah Copper Corp. v. U.S. Dep't of Interior*, 88 F.3d 1191, 1223 (D.C. Cir. 1996) (preamble reviewable only where it has "independent legal effect, which in turn is a function of the agency's intention to bind either itself or regulated parties."); *Florida Power & Light Co. v. EPA*, 145 F.3d 1414, 1418-20 (D.C. Cir. 1998) (denying review of preamble).

application for rehearing unless there is reasonable ground for failure so to do."). *See City of Orville v. FERC*, 147 F.3d 979, 990 & n.13 (D.C. Cir. 1998); *Gulf States Utils. Co. v. FERC*, 1 F.3d 288, 291-92 (5th Cir. 1993); *cf. FPC v. Colorado Interstate Gas Co.*, 348 U.S. 492, 498-99 (1955) (construing analogous provision in § 19(b) of the Natural Gas Act).[11]

New York's failure to raise its issue as to the scope of "in interstate commerce" before the Commission makes it impossible, as a practical matter, for courts to undertake judicial review of that issue. In its two briefs, New York has relied entirely on materials outside of the rulemaking record. *See* NY Br. at 45 n.28; Brief of New York as Respondents in No. 00-809 ("NY Resp. Br.") at 25-26. Neither the Commission nor the other parties to the rulemaking had any opportunity to address New York's points in that context through factual material or otherwise. This is not the forum in which to begin a scientific debate as to the flow of electrons on the interstate grid. In fact, in interpreting parallel statutory language, this Court has ruled that when a party fails to present its issue to the Commission, the court of appeals may not even decide it *sua sponte*. *FPC v. Colorado Interstate Gas Co.*, 348 U.S. at 498-99.

In any event, there is no merit to New York's position. The salient principle of *FPC v. Florida Power & Light Co.*, 404 U.S. 453 (1972), is that the potential for commingling of electrons among interconnected systems is sufficient to demonstrate the interstate nature of the transmissions. The Court did not limit the scope of its holding to accounting

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[11] Even in the court of appeals, New York did not raise the largely factual issues that it is raising now. On the contrary, it acknowledged in that court that "[t]he issue here is a question of law." Brief of Petitioners/Intervenors Public Service Commissions of New York and Florida, *et al.*, at 11 n.14 (Aug. 19, 1999), *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000) (No. 97-1715).

requirements, and no court has construed it as such. *See, e.g., FERC v. Mississippi*, 456 U.S. 742, 757 (1982). Subsequent cases have consistently observed that it is impossible to know the source or destination of individual electrons, and have therefore accepted that transmission over the grid involves interstate commerce. *E.g., Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 381 (1983); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 336 (1982).

Here, New York asserts that retail customers receive most of their energy from the nearest power plant, but does not purport to show that generation from other sources plays no part in serving them. Indeed, New York acknowledges as "arguably accurate" the assumption that all transactions affect the entire grid and admits it is "technically correct" that electrons added to the grid will travel throughout. NY Resp. Br. at 25. Yet this Court has held that the amount of electricity flowing in interstate commerce is irrelevant. *Connecticut Light & Power*, 324 U.S. at 536; *Florida Power & Light*, 404 U.S. at 463. Thus, the admitted possibility that electrons flowed into or out of the state is a sufficient basis to find transmission "in interstate commerce."

New York's argument is ultimately based on a mistaken interpretation of FPA § 201(c). In its view, that subsection "states that transmissions are *not* interstate if they are between buyers and sellers in the same state." NY Br. at 37. But this provision does not refer to "buyers" and "sellers" at all: "For the purpose of this subchapter, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof . . . ." 16 U.S.C. § 824(c). In view of the interconnected nature of the grid and the multiple, non-contractual paths followed by power flows, the Commission could reasonably find that some of the electrons reaching a retail buyer of electric power

originated outside of the buyer's state.[12] Thus, this case must be decided on the Commission's premise that transmission service for unbundled retail sales on the interstate grid involves "the transmission of electric energy in interstate commerce." 16 U.S.C. § 824(b).

B. Transmission Unbundled From a Retail Sale Does Not Fall Within Any of the Exceptions to Section 201(b).

The grant of jurisdiction in FPA § 201(b) for transmission in interstate commerce is not limited by any exception that would preclude FERC from asserting jurisdiction over unbundled retail transmission. FERC found, and the court of appeals agreed, that this grant was not limited to transmission in the course of wholesale transactions. Pet. App. 34a, 305a, 333a. FERC observed that § 201(b) contained two separate grants of jurisdiction that differed in scope—one for the "transmission of electric energy in interstate commerce" and the other for "the sale of electric energy at wholesale in interstate commerce." Pet. App. 333a; *see also* Pet. App. 305a. The first grant for interstate transmission stands in contrast to the second, which the statute specifically limits to

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[12] Moreover, the distinction between "intrastate" and "interstate" transmission proposed by New York based on its interpretation of FPA § 201(c) is unworkable. Under current retail access programs, electric suppliers do not typically identify the source of their power by reference to a particular generating plant. Rather, they typically acquire a portfolio of generating resources that they can use to supply their overall load requirements. These portfolios include contracts for system power and contracts with other marketers that are selling out of their own portfolios. In many areas of the country, moreover, utilities have formed multi-state power pools in which sources of supply are centrally sold and purchased on a regional basis without identification of generation sources to individual states. In short, New York has not explained how it would even be possible to implement the proposed distinction between interstate and intrastate transmission transactions under its interpretation of § 201(c).

sales "at wholesale." This omission of the reference to "at wholesale" strongly indicates an intent not to limit FERC's jurisdiction over transmission service to wholesale transactions.

This intent is underlined by the one portion of § 201(b) specifically addressing retail transactions. Section 201(b) not only grants jurisdiction over wholesale transactions, but denies any federal jurisdiction over retail sales of electric energy: "The provisions of this subchapter . . . shall not apply to any other sale of electric energy. . . ." 16 U.S.C. § 824(b). The language of this proviso plainly pertains to a sale *of electric energy*. It is this form of retail transaction that is placed outside the Commission's jurisdiction. The proviso by its express terms does not apply to a sale of *transmission service*.

New York cannot turn a sale of unbundled transmission service into a sale of energy by calling unbundling a mere accounting convention. *See, e.g.*, NY Br. at 8 ("Unbundling is a change in bill format."). The heart of unbundling is that each service may be purchased without the other, enabling competition.[13] When transmission is unbundled, it is available from the transmission owner without purchasing its energy at all.[14] Thus, the furnishing of unbundled transmission service is not a "sale of electric energy" within the proviso to § 201(b).

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[13] *See, e.g.*, Conn. Gen. Stat. §§ 16-244b, 244e ("All customers of electric distribution companies . . . shall have the opportunity to purchase electric generation services from their choice of electric suppliers . . . in a competitive generation market . . . ."); Del. Code Ann. Tit. 26 § 1003; Me. Rev. Stat. Ann. Tit. 35-A § 3202; Okla. Stat. Ann. Tit. 17 § 190.4; Va. Code Ann. § 56-577. *Cf. Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 284 (1997) (describing unbundling of natural gas).

[14] New York admits, "Unbundling . . . allows customers the option of obtaining one or more retail service elements from competitive providers, instead of the utility." NY Br. at 9 (footnote omitted).

Rather than discuss this operative language, however, New York discusses at length the declaration of policy in FPA § 201(a). In essence, New York would have this Court avoid the plain language of § 201(b) by interpreting § 201(a) as imposing an "at wholesale" qualification to the "transmission of electric energy" language. This effort at reconstruction of the statute should be rejected.

First, FPA § 201(a) is a declaration of policy, not a substantive provision of the statute. *See* 16 U.S.C. § 824(a) ("It is declared that . . . ."). Thus, this Court's cases have consistently held that § 201(a) cannot trump specific language in § 201(b). *See Connecticut Light & Power*, 324 U.S. at 527 (holding § 201(a) "cannot nullify a clear and specific grant of jurisdiction, even if the particular grant seems inconsistent with the broadly expressed purpose."); *FPC v. Southern Cal. Edison Co.*, 376 U.S. 205, 215 (1964).

Second, even viewing § 201 as a saving clause, it does not provide the States with jurisdiction over a new service like unbundled retail transmission. Section 201(a) of the FPA states in pertinent part that "Federal regulation . . . [is] to extend only to those matters which are not subject to regulation by the States." 16 U.S.C. § 824(a). At most this suggests that the States would continue to regulate those matters that they were then regulating. Interstate transmission unbundled from a retail sale of energy was not among the transactions regulated by the States in 1935 and therefore was not "saved" by this provision. *See Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 162 (1920) ("[t]he usual function of a saving clause is to preserve something from immediate interference—not to create"); *Gorbach v. Reno*, 219 F.3d 1087, 1094 (9th Cir. 2000) (*en banc*) ("Under the saving clause, what authority the Attorney General has, she keeps, but it does not give her more.").

Even taking the most aggressive interpretation of FPA § 201(a)—that it reflected a policy of giving the States

jurisdiction over any area that they *could* regulate—it would not have encompassed unbundled interstate transmission. The scope of what Congress believed the States could regulate would be measured by the relevant constitutional law that existed at the time of enactment. *See FPC v. East Ohio Gas Co.*, 338 U.S. 464, 472 (1950) ("*[P]rior* constitutional decisions, not what we have since decided or would decide today, form the measure of the gap which Congress intended to close by this Act."); *Phillips Petroleum Co. v. State of Wisconsin*, 347 U.S. 672, 684 (1954). In 1935, state regulation of interstate transmission distinct from a sale of electric power would have been viewed as a "direct" regulation of interstate commerce, and hence impermissible under the dormant Commerce Clause.

Mill Creek Coal & Coke Co. v. Public Service Commission, 100 S.E. 557 (W. Va. 1919), a case later cited by this Court in *Attleboro*, illustrates this point. *Mill Creek Coal* involved a Virginia hydro-electric company selling electric power directly to consumers in West Virginia. *Id.* at 560-61. The court stressed the distinction between the sale of electric power and the independent sale of transmission: "The vital distinction should be noted between regulation of rates of transportation and of the rates at which a commodity shall be sold." *Id.* at 562. The court recognized that rates of transportation invoked matters of "national importance requiring uniformity of regulation respecting the rates thereof, and hence [are] usually beyond the regulatory power of the state." *Id.* Nevertheless, when transmission is sold to the retail customer as part of the price of the commodity, the state's regulatory interests are elevated: "The price at which a commodity is sold is essentially local, affecting chiefly those in the community where it is made, and only incidentally, if at all, touching those outside of the

community." *Id.* Thus, the court held, the sale of the delivered commodity was subject to state regulation.[15]

This Court's precedents just prior to passage of the FPA reflect the same thinking. Thus, in *Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927), this Court cited *Mill Creek Coal* for the concept that "transmission of electric current from one state to another, like that of gas, is interstate commerce." *Attleboro*, 273 U.S. at 86. The Court reasoned that state regulation of an interstate wholesale sale of electricity was impermissible as a "direct burden upon interstate commerce." *Id.* at 89.[16] Thus, under the law at the time of enactment of the FPA, transmission unbundled from a retail sale would likely have been viewed as outside the states' regulatory power, since such state regulation would have been viewed as a "direct" rather than incidental burden on interstate commerce.

In view of this state of the law at the time of enactment, the policy declaration in § 201(a) would not help New York's case. The states never exercised authority to regulate the

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[15] *Mill Creek Coal*'s reasoning is consistent with the Court's existing precedents holding that the direct regulation of transportation between States fell within the exclusive power of the federal government. *See South Covington & Cincinnati St. Ry. v. City of Covington*, 235 U.S. 537, 545-48 (1915); *Wabash St. L. & P. Ry. v. State of Illinois*, 118 U.S. 557, 573-77 (1886).

[16] On the other hand, the interstate transmission involved in the bundled transaction in *Pennsylvania Gas Co. v. Public Service Commission*, 252 U.S. 23 (1920), was viewed as distinguishable on the ground that it was part of the "furnishing of gas" to local consumers. *Attleboro*, 273 U.S. at 87-88. "In holding that the New York Public Service Commission might regulate the rate charged to these consumers, the court said that while a state may not 'directly' regulate or burden interstate commerce, it may in some instances, until the subject matter is regulated by Congress, pass laws 'indirectly' affecting such commerce, when needed to protect or regulate matters of local interest . . . ." *Id.* at 87.

transmission sold independently of the sale of electricity and could not have done so if they tried. New York's effort to invoke the declaration of policy to achieve an *expanding* reservation of jurisdiction to the states runs counter to this Court's precedents interpreting the FPA, which have insisted that the lines drawn by that statute do not change in light of evolving constitutional standards. *Arkansas Elec. Coop. Corp.*, 461 U.S. at 380; *Southern California Edison*, 376 U.S. at 213-17. The policy declaration in § 201(a) does not override the specific grant of jurisdiction over interstate transmission.

C. The Legislative History Does Not Contradict The Plain Language Used In the Statute.

New York emphasizes various forms of legislative history as an antidote to the statutory language. It cites snippets from hearings, debates, and committee reports, as well as subsequent legislative history and litigation positions. Such legislative history is not relevant in the interpretation of an unambiguous statute.[17] Congress has granted jurisdiction over transmission in interstate commerce, except where that function is an inseparable part of a direct sale of electric energy. No resort to the legislative history is necessary or appropriate.

Even if resort to legislative history were permissible, however, *this* legislative history would not be of any assistance. In Order No. 888, FERC was addressing a new phenomenon—unbundled transmission at the retail level—which did not exist at the time of enactment of the FPA. No one in Congress in 1935 could have formed or expressed an intent as to how this new product should be handled, and no

[17] *Davis v. Michigan Dep't of the Treasury*, 489 U.S. 803, 808 n.3 (1989) ("Legislative history is irrelevant to the interpretation of an unambiguous statute."); *Russello v. United States*, 464 U.S. 16, 23 (1983); *United States v. Oregon*, 366 U.S. 643, 648 (1961).

one did. Thus, even some of the parties signing the New York brief told the Commission that the legislative history is inconclusive.[18] The Commission concluded that the legislative history did not speak directly to the issue at hand. *See* Open Access NOPR, 60 Fed. Reg. 17,662, 17,713 (Apr. 7, 1995).

In fact, the legislative history provides at least as much support for the Commission's interpretation of the statute as for that urged by petitioners. In the first place, as New York itself points out, legislators were concerned that "Congress might inadvertently empower FERC to preempt *pre-existing* state regulation." NY Br. at 20 (emphasis added). *See also* NY Br. at 23 ("The Reports repeatedly stated that the proposed legislation safeguarded all aspects *of pre-existing* state regulation.") (emphasis added); NY Br. at 28, *quoting* FPC Commissioner Seavey ("everything is left to the state commissions that they are performing now"). Such pre-existing state regulation encompassed only the regulation of bundled retail sales, which FERC has preserved.

Second, New York cites several statements in the legislative history suggesting that Congress did not intend to confer FERC jurisdiction over retail sales. NY Br. at 21. As noted earlier, however, this intent is effectuated by the language of FPA § 201(b), which prohibits federal authority over "any other sale of electric energy"—language that does not address interstate transmission sold independently of electric energy. Similarly, California points to various statements indicating that Congress intended to "adopt" this

[18] *See* Request of the National Association of Regulatory Utility Commissioners for Rehearing of Order No. 888, at 5 ("we agree that the legislative history is not helpful in resolving this jurisdictional question") (May 24, 1996) (FERC Docket Nos. RM95-8-00 and RM94-7-001); Request of the Staff of the Virginia State Corporation Commission for Rehearing of Order No. 888, at 4 ("The legislative history of the FPA does not resolve this jurisdictional question . . . .") (May 23, 1996) (FERC Docket Nos. RM95-8-00 and RM94-7-001).

Court's decision in *Pennsylvania Gas Co. v. Public Service Commission*, 252 U.S. 23 (1920). Calif. Br. at 8-11. But the heart of that case was a sale of delivered (*i.e.*, bundled) electricity to the retail customer. Thus, even Solicitor DeVane's statement, as quoted by California, reveals the necessity for a sale as a predicate for jurisdiction under the retail sale proviso. *See* Calif. Br. at 10-11 ("This bill does not give the Commission jurisdiction over *energy* that is transmitted in interstate commerce by a particular company and *sold by that company* to consumers.") (emphasis added). These and other statements regarding "rates" for retail sales must be read in their historical context, when all retail sales involved bundled delivery of energy.

Third, the states are not helped by legislative history indicating that Congress was seeking to fill the jurisdictional void left by this Court's *Attleboro* decision. That history may illuminate the distinction drawn in the statute between wholesale transactions in interstate commerce and "any other sale of electric energy," but it does not explain Congress' enactment of a separate head of jurisdiction for "transmission of electric energy in interstate commerce. . . ." 16 U.S.C. § 824(b). Even in 1935, Congress was aware of an increasing amount of interstate transmission that would not be subject to state regulation. *See* 79 Cong. Rec. 10,352, 10,377 (June 28, 1935) (volume of interstate transmission was "constantly growing and will increase indefinitely in time and amount.") (statement of Rep. Lea). Thus, the legislation was worded "to make plain that it includes interstate transmission where there is no sale . . . ." S. Rep. No. 74-621, at 19 (1935).

Indeed, even though *Attleboro* involved a wholesale transaction, it cited *Mill Creek Coal* for the proposition that the transmission of energy across state lines was interstate commerce. As noted above, state regulation of interstate transmission in the absence of a retail sale of energy would have been problematic under the Commerce Clause. *Cf. Mill Creek Coal*, 100 S.E. at 562 ("Because of the very nature of

the subject-matter conflicting state regulations respecting [transmission] rates ordinarily would result in discord and chaos."). Congress knew of the "comparatively recent transformation [of the electric industry] from an industry of a purely local character to one of a dual local and national character."[19] There was thus good reason for Congress to make a separate provision for federal authority over the transmission of electric energy in interstate commerce.

This grant becomes particularly relevant when states restructure retail service for competition and thereby permit participation by energy suppliers in an interstate market. Out-of-state generators competing for those retail customers need equal access to transmission in order to provide competitive service. Yet individual states are not well situated to regulate unbundled interstate transmission. Once a state's retail markets are opened to out-of-state competition, its interests as a regulator of the incumbent utility may conflict with those of other states whose generators are interested in serving those same retail customers. *See Arkansas Elec. Coop. Corp.*, 461 U.S. at 377 ("[T]he production and transmission of energy is an activity particularly likely to affect more than one State, and its effect on interstate commerce is often significant enough that uncontrolled regulation by the States can patently interfere with broader national interests."). Thus, when a state chooses to unbundle retail service and opens its doors to retail competition, the FPA permits the transmission network to be managed on a regional or national level.[20]

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[19] *Public Utility Holding Act of 1935: Hearings on S. 1725 Before the Senate Comm. on Interstate Commerce*, 74th Cong. 797 (1935) (Memorandum of Oswald Ryan, FPC General Counsel, and Dozier A. DeVane, FPC Solicitor).

[20] *Cf. Gulf States Utils. Co. v. FPC*, 411 U.S. 747, 758 (1973) (a primary purpose of the FPA was to "provide effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce."); *Appalachian Power Co. v. Pub. Serv. Comm'n. of West Virginia*, 812 F.2d 898, 904-05 (4th Cir. 1987).

D. New York Cannot Defeat the Language of the Statute By Reliance On Presumptions Regarding Preemption.

Finally, New York cannot defeat federal jurisdiction over unbundled retail transmission by invoking a presumption against federal preemption of traditional state powers. *See* NY Br. at 13-17. Preemption analysis focuses on the impact of a defined federal regulatory scheme on state laws in the same or a related field.[21] Here, the preemptive effect of the federal scheme is clear: if FERC has jurisdiction of a form of transmission, that jurisdiction is exclusive. *See Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 377 (1988) (Scalia, J., concurring) ("It is common ground that if FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject."). Thus, the question here is not what provision Congress has made for preemption, but what jurisdiction Congress granted in the first instance in the agency's organic statute. None of the cases cited by New York for its presumption deal with jurisdictional questions of that kind, and this Court has not applied that presumption in interpreting grants of authority to federal agencies.[22]

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[21] Thus, in each of the classic preemption cases cited by New York, it was not the scope of the federal officials' power to which the presumption was applied, but rather to the question whether concurrent state regulation was displaced. *See, e.g., Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) (Federal Warehouse Act preemptive of similar state regulation); *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977) (whether Federal Meat Inspection Act displaces state labeling law); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) (whether federal tobacco labeling requirement preempts state tort action).

[22] *Cf. Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 743-44 (1996) (finding presumptions against preemption do not apply to issues concerning the substantive meaning of statutes, even if one proposed meaning results in greater preemption than another).

This is categorically true with respect to the Federal Power Act. In FPA § 201, Congress provided specific instructions as to the scope of federal jurisdiction.[23] While this Court has analyzed the scope of that section at least nine times, *not a single one* of this Court's decisions has relied on a presumption in favor of state police powers as a tool in that analysis. In each case, the Court has approached the statute based on its own terms, rather than an exogenous assumption about congressional intent to preempt.

In any event, federal jurisdiction over unbundled interstate transmission does not involve an encroachment on the State's traditional police powers. The States have *never* regulated (and most likely could not regulate) interstate transmission severed from the sale of electricity. The presumption against federal preemption cited by New York has no role with respect to this new service and the new interstate markets in which it will be offered.

Finally, FERC's interpretation of § 201(b) does not leave the States without authority over matters of primarily local concern. New York does not articulate, and it is difficult to conceptualize, how the Commission's jurisdictional decision has harmed these petitioners. Even where states have introduced competition, they nevertheless retain jurisdiction over all retail energy sales, all local distribution facilities (whose extent will be based on their own recommendations); all transactions of municipalities; and over all generation and transmission siting. Moreover, it is only where states have, subsequent to Order No. 888, chosen to restructure their retail markets that retail transmission would fall under federal jurisdiction. Order No. 888 does not intrude unduly into local matters or significantly alter the federal-state balance.

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[23] *Cf. Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 376 n.5 (1986) (Communications Act "presents its own specific instructions regarding the correct approach to the statute").

E. All Retail Transmission Does Not Fall Under The Exception for Local Distribution.

Amicus California presses for reversal on a completely different ground than that urged by New York. California acknowledges that § 201(b) confers FERC jurisdiction over interstate transmission, but it argues that all retail transmission is exempt from FERC regulation under the exception for "local distribution" facilities in § 201(b). In Order No. 888, FERC interpreted the "local distribution" proviso and adopted a fact-based, seven-factor test for determining whether a facility functions primarily as a local distribution facility subject to state jurisdiction. Pet. App. 282a-283a. California now effectively attacks the validity of that test, arguing that all unbundled retail transmission constitutes "local distribution" under § 201(b).

California's argument is not properly before this Court. California did not appear as either a party or an amicus in the proceedings below. Petitioner New York did not present California's issue before FERC[24] and did not attack the seven-factor test at all before the court of appeals. On the contrary, in the court of appeals, New York *endorsed* the seven-factor test as a means of defining "local distribution" and argued that it should be applied to wholesale transactions as well as retail ones.[25] The court of appeals addressed and

[24] The argument made by California is barred by FPA § 313(b) because it was never presented to the Commission in a petition for rehearing by a party in these proceedings. Before FERC, New York argued that only two of the seven factors should be used to identify local distribution in large metropolitan and remote rural areas. New York Motion for Rehearing of Order No. 888, at 18-19 (May 24, 1996) (FERC Docket Nos. RM95-8-00 and RM94-7-001). New York did not pursue this challenge in the court of appeals.

[25] *See* Brief of Petitioners/Intervenors Public Service Commissions of New York and Florida, *et al.*, at 31 (Aug. 19, 1999), *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000) (No. 97-1715) ("The seven-indicator test established in FERC Order 888

rejected this complaint. Pet. App. 37a-39a. New York then raised its effort to expand the use of the seven-factor test in its petition for certiorari to this Court, but even this issue regarding local distribution was not accepted for review. In these circumstances, California, as amicus, cannot introduce before this Court a completely different attack on the Commission's rulemaking that has never been presented to any tribunal in the proceedings below.[26]

In any event, FERC's reading is faithful to the statutory text, giving meaning to all of the proviso's language. The phrase "facilities used in local distribution" delineates an exception to the Commission's jurisdiction over facilities used for jurisdictional transmission and sales. California's reading would make redundant the exception for "any other sales of electric power," since, in its view, all aspects of retail sales, including unbundled transmission, fall within the exception for local distribution. Yet § 201(b) identifies "local distribution" as a *separate* exception. Congress presumably intended it to have a separate, more narrow meaning than the retail sales proviso.

That meaning is apparent upon examination of the case law available to the Congress that enacted the FPA. This Court had held in *East Ohio Gas Co. v. Tax Comm'n of Ohio*, 283 U.S. 465 (1931), that interstate movement of natural gas had ended, for tax purposes, when it was stepped down in pressure and divided into the many small service lines that connected with the pipes on the consumers' premises. This

represents FERC's current judgment as to what constitutes local distribution, and should be applied in all instances to define the local distribution facilities subject to state regulation rather than federal.") (footnote omitted).

[26] This Court will not consider an argument advanced by amicus when it was not raised or passed on below and is not advanced in this Court by the party on whose behalf the argument is being raised. *See United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981).

was viewed as analogous to the "breaking of an original package." *Id.* at 471. Thus, "local distribution" did not refer to an entire "retail sale" but to the point in the process of delivery where interstate shipment was thought to end. *Id.* at 472.

This doctrine was promptly applied to the distribution of electric power. "While electric current can hardly be said to 'come to rest' within the state, its interstate journey ends at the transformer which uses it for the production of low voltage currents for use within the state. The situation is the same in principle as the breaking up of an original package . . . ." *South Carolina Power Co. v. South Carolina Tax Comm'n*, 52 F.2d 515, 525 (E.D.S.C. 1931) (cited in the 1935 Senate Hearings at 802), *aff'd*, 286 U.S. 525 (1932).

Shortly thereafter, Congress enacted the FPA, with its language exempting "local distribution" facilities in § 201(b). In *Connecticut Light & Power Co. v. FPC*, 324 U.S. 515 (1945), this Court confirmed that this phrase would be interpreted consistently with the basic standard of *East Ohio Gas*, but adapted to fit the peculiarities of electrical transmission. The question there was whether facilities used to "step down" the voltage were local distribution facilities. The Court found that its prior holding that "distributing gas at low pressure to consumers is a local business" did not address the question whether "the process of reducing energy from high to low voltage in subdividing it to serve ultimate customers" was also "local distribution." *Id.* at 534. Thus, the Court remanded this issue to the Commission for what was viewed as a factual determination.[27] The Court never adopted any holding that all retail sales were covered by the local distribution exemption.

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[27] *See Connecticut Light & Power*, 324 U.S. at 534-35 ("It is not for us to make an original appraisal of the facts. We do not therefore undertake to decide as an original matter whether the facilities in question are or are not facilities which can subject the Company to the act.").

Again in *FPC v. Southern California Edison Co.*, 376 U.S. 205, 210 n.6 (1964), this Court observed that whether facilities are used in local distribution "involves a question of fact to be decided by the FPC as an original matter." There, the Court sustained the Commission's finding that certain retail sales at high voltage to industrial customers were not local distribution. With support in the record, the Court reasoned, "the conclusion may properly rest upon the specialized experience of the FPC in determining such questions." *Id.* at 210. Other decisions of this Court have similarly treated the phrase "local distribution facilities" as determined by the physical characteristics of the electrical or gas lines, rather than the presence of a retail transaction.[28]

Thus, FERC acted well within existing precedent when it promulgated a rule seeking to define "local distribution" based on the physical characteristics of the facilities, such as the voltage and the role of the lines in directing energy to an end use. *See* note 4, *supra*. Neither *amicus* California nor any party has shown that rule to be arbitrary and capricious. Thus, unbundled retail transmissions are not excepted from the Commission's jurisdiction by virtue of the exception for "local distribution facilities."

Finally, California attempts to rely on its own well known problems with power supply as a reason for this Court to reject FERC's jurisdictional rule. Calif. Br. at 1-2, 27. California offers no support for its assertion that its recent problems were caused by FERC's assertion of jurisdiction over unbundled retail transmission. With or without such

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[28] *See United States v. Public Utilities Comm'n of Cal.*, 345 U.S. 295, 316 (1953) ("[T]he facilities supplied 'local distribution' only after the current was subdivided for individual consumers."); *East Ohio Gas Co.*, 338 U.S. at 469-70 ("[W]hat Congress must have meant by 'facilities' for 'local distribution' was equipment for distributing gas among consumers within a particular local community, not the high-pressure pipe lines transporting the gas to the local mains.").

jurisdiction, FERC would still possess authority over all wholesale transactions in the state and would still lack authority over bundled retail sales. California's problems are severe, but they are not related to the Commission's assertion of jurisdiction over the specific category of transmission lines used in unbundled retail sales.[29] California's recent troubles do not change the legal analysis here.

II. FERC LAWFULLY DECLINED TO ASSERT JURISDICTION OVER TRANSMISSION THAT IS BUNDLED WITH A RETAIL SALE.

In Order No. 888, FERC limited its jurisdiction at the retail level to interstate transmission that occurs when states direct or permit utilities to unbundle their services. FERC therefore preserved State jurisdiction over bundled retail transmission that had been exercised before the FPA was enacted and that has continued to be exercised for the last 65 years under the FPA. Enron now seeks to displace this established regulatory scheme, arguing that FERC should have exercised exclusive jurisdiction over *all* transmission at the retail level even if bundled with a retail sale.

The reach of this assertion is breathtaking. Enron's position means that for the five or more decades since the interstate nature of transmission on the grid has been established, FERC has been failing in its duty to regulate the transmission component of bundled retail sales; all state commissions have been erroneously asserting jurisdiction over the transmission aspect of such sales; and all reviewing courts have erred in failing to recognize and enforce this distinction. Enron's position would also require all existing

[29] For example, California's approach would not alter FERC's authority to regulate the Independent System Operator ("ISO"), because FERC has jurisdiction over wholesale transactions, including unbundled wholesale transmissions, for which the ISO is primarily responsible.

bundled retail rates to be unbundled and re-established, an enormous undertaking.

In viewing transmission for a bundled sale as part and parcel of the retail sale, FERC adopted a reasonable interpretation of the statutory language, which accords with the history of operation under the statute. FERC also limited the scope of its mandatory open access tariff to those markets in which it is needed: those in which transmission owners are competing against generators for the same retail customers. If there is any ambiguity in the statute, FERC's interpetation should be upheld as a reasonable construction entitled to judicial deference.

A. Enron Ignores Statutory Language That Preserves Pre-Existing State Jurisdiction Over Bundled Retail Sales.

Section 201(b) reserves to the States jurisdiction over all retail sales of electricity. Under that provision, the Act applies to interstate transmission or wholesale sales of electric energy but not "to any other sale of electric energy." 16 U.S.C. § 824(b). FERC reasonably viewed transmission bundled in a retail sale as an integral component of that sale of energy. It therefore properly refrained from taking jurisdiction in light of the express terms of the proviso.

Enron does not challenge the Commission's characterization of bundled transmission. In fact, Enron admits that the transmissions for which it seeks federal jurisdiction are "components of a bundled retail sale . . . legally as well as factually." Enron Br. at 18. Given a proviso that expressly excludes "any other sale of electric energy," this admission should be fatal.

Enron would apparently read this proviso out of the statute. Neither its opening nor its responsive brief mentions it. Enron reasons: "Transmission of energy across state borders does not cease to be interstate transmission merely because it

is bundled with a sale of energy as an invoicing matter." Enron Br. at 18.

This reasoning is flawed at its core. The question is not whether a transmission ceases to be interstate, but rather whether, as a component of a bundled sale, it is excluded under the terms of a proviso that carves out "any other sale of electric energy." Order No. 888 gives meaning to that language because it finds that a transmission service that might otherwise meet a jurisdictional requirement (interstate transmission) is *excluded* from FERC jurisdiction. This reading gives effect to all of the language in the statute. Otherwise, the "other sale" proviso would have no purpose. It would redundantly exclude the very same non-wholesale sales that are left out of § 201(b)'s jurisdictional grant.

Moreover, like New York, Enron is wrong to characterize the bundling of retail sales as only an "invoicing matter." When transmission is bundled in a retail sale, there is not only a single price, but also a single product—delivered energy. The consumer can buy only that product and only from one utility in a single transaction. The utility's delivery of the energy to the consumer is thus an inseparable aspect of the utility's "sale of electric energy" within the meaning of the proviso to § 201(b). As FERC stated, "we believe that when transmission is sold at retail as part and parcel of the delivered product called electric energy, the transaction is a sale of electric energy at retail." Pet. App. at 306a.

FERC's interpretation not only gives meaning to the proviso of § 201(b); it also fits well with the declaration in § 201(a), which reserved to the States their preexisting regulatory jurisdiction. In 1935, there were already a substantial number of bundled retail sales involving what was found to be interstate transmission within the State's regulatory authority. *Mill Creek Coal,* like *Pennsylvania Gas* in the natural gas area, exemplified this phenomenon.

Congress clearly intended to give regulation of such sales to the States.

The legislative record surrounding the 1935 Act confirms this point. It shows that Congress intended to preserve existing state authority over bundled retail sales of electric power, including those that involved interstate transmission over an integrated system. Both Committee reports state that the bill leaves to the States their authority over retail sales of electric energy, even where that energy is brought in from out of state.[30] In proposing the bill later enacted into the FPA, FPC Solicitor DeVane repeatedly stated during his testimony that the States would retain jurisdiction over bundled retail service even when interstate transmission was involved.[31] While legislative history may be of questionable value in applying a statute to a product or service that was not even known to the enacting Congress (such as unbundled retail transmission), it has force when legislators have specifically considered the situation and consistently expressed their intent.

In the years that followed, FERC never asserted any jurisdiction over the transmission aspects of bundled retail sales[32] and the States universally did

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[30] *See* S. Rep. No. 74-621, at 48 (1935) ("This subsection leaves to the States the authority to fix local rates even in cases where the energy is brought in from another State."); H.R. Rep. No. 74-1318, at 27 (1935) ("[T]he authority of States to fix local rates is not disturbed even in those cases where the energy is brought in from another State.").

[31] Mr. DeVane made his views explicit in a colloquy with Congressman Monoghan. *See Pub. Util. Holding Cos.: Hearings on H.R. 5423 Before the House Committee on Interstate and Foreign Commerce,* 74th Cong. 521-22 (1935).

[32] Enron concedes that "the Commission heretofore has not exercised its . . . authority to regulate transmission to a retail customer." Application of the Coalition for a Competitive Electric Market for Reconsideration and Clarification or, In the Alternative, Rehearing of

so.[33] This longstanding interpretation by the federal agency charged with administration of the Act is entitled to considerable deference. *E.g., United States v. Cleveland Indians Baseball Co.*, 121 S. Ct. 1433, 1444-45 (2001) (according "substantial" deference to agency's 61-year interpretation); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974).

Moreover, Congress has twice amended the jurisdictional sections of the FPA, but has left alone state regulation of bundled retail sales. *See* PURPA, Pub. L. No. 95-617, Title II, § 204(b), 92 Stat. 3140 (1978); Energy Policy Act, Pub. L. No. 102-486, Title VII, § 714, 106 Stat. 2911 (1992). In these circumstances, Congress has acquiesced in the existing federal-state allocation of jurisdiction over bundled retail sales. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143-61 (2000); *Bob Jones Univ. v. United States*, 461 U.S. 574, 599-601 (1983).

Indeed, in 1992, Congress enacted amendments to the FPA that confirmed the inability of the Commission to deal with transmission aspects of a bundled retail sale. In § 212(h) of the FPA, Congress precluded FERC from conditioning any of its orders upon or directing "the transmission of electric energy . . . directly to an ultimate consumer." 16 U.S.C. § 824k(h). In effect, FERC was barred from ordering that any utility provide "retail wheeling" — mandatory transmission access to any retail consumer.

Order No. 888, at 5 (May 24, 1996) (FERC Docket Nos. RM95-8-00 and RM94-7-001).

[33] *See, e.g.*, Pet. App. 28a, 30a; *People ex. rel. Horton v. Prendergast*, 162 N.E. 10, 12 (N.Y. 1928); *see also* Hon. Ashley C. Brown, *State Power Over Transmission Access and Pricing: The Giant Will Not Sleep Forever*, 124 Pub. Utils. Fort. 21 (1989) ("State jurisdiction over retail rate making provides for considerable influence over transmission policy. The bulk of transmission pricing is already done by the states in the course of retail ratemaking. ") (*available in* Westlaw TP-ALL).

At the same time, Congress did nothing to disturb the existing state regulation of bundled transmission at the retail level and specifically sought to preserve it. "Nothing in this subsection shall affect any authority of any State or local government under State law concerning the transmission of electric energy directly to an ultimate consumer." 16 U.S.C. § 824k(h). This section necessarily assumes that States have some degree of authority over transmission to a consumer and would be meaningless if Enron's interpretation of FPA § 201(b) were correct. Where "Congress has not just kept its silence by refusing to overturn the administrative construction, but has ratified it with positive legislation, we cannot but deem that construction virtually conclusive." *CFTC v. Schor*, 478 U.S. 833, 846 (1986) (quotations and citation omitted).

At this point, a rule classifying transmission underlying bundled retail sales as subject to federal jurisdiction would create a huge regulatory burden and uncertainty in the industry. It would require FERC to go back and reset the price for the transmission component of every such retail sale, and then force every State that has not unbundled retail services to establish separate rates for the generation and distribution components of the rates for each utility subject to its jurisdiction. Absent a clear showing of such intent, the statute should not be interpreted to disturb the established federal and state practices governing the regulation of bundled retail sales and to inject such regulatory uncertainty into the industry.

B. The NGA Case Law Does Not Compel a Conclusion That FERC Has Jurisdiction Over Bundled Retail Transmission.

Lacking supporting FPA cases, Enron resorts to the case law delineating FERC's jurisdiction under the Natural Gas Act ("NGA"), such as this Court's decision in *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972). The

NGA case law, however, though sometimes relevant to interpreting the FPA, is not on-point here, and does not compel the extension of FERC jurisdiction to bundled retail transmission.

As Enron points out, this Court has an "established practice of citing interchangeably decisions interpreting the *pertinent* sections of the two statutes." *Arkansas Louisiana Gas Co v. Hall*, 453 U.S. 571, 577 n.7 (1981) (emphasis added). But the Court has never stated that the *jurisdictional* provisions of the two statutes are interchangeable, and with good reason. Jurisdictional principles under the Natural Gas Act have developed differently in light of the characteristics of the gas industry and the somewhat different structure of that statute. A mechanical appropriation of the law from the NGA to the FPA in the jurisdictional context would be inappropriate.

Congress enacted the jurisdictional provisions of the FPA and NGA against the backdrop of two industries that already had different origins and organizational structures. Electrical generation facilities were typically sited in or near the service territory of the utility, but gas fields had to be exploited where they were found. Most gas had to be transported by pipeline at long distances and across State lines from gas fields located in a few producing areas.[34] Interstate pipelines were therefore widely used to bring gas from producing regions to consuming states. Moreover, the gas industry was characterized by separate ownership of the individual segments of the industry, whereas the electric industry has been historically characterized mostly by vertical ownership and

[34] *See Pennsylvania v. West Virginia*, 262 U.S. 553, 586-87 (1923); *see also Hearings on H.R. 11662 Before House Committee on Interstate and Foreign Commerce*, 74th Cong. 117 (statement of John E. Benton, General Solicitor of Railroad and Utilities Commissioners) ("Thirty-seven States which now use natural gas to a greater or less extent obtain most of that gas, with the exception of six or eight States, outside of their own borders.").

integrated generation of all segments of the business.[35] Thus, interstate transportation was typically handled by companies different from those that handled production and distribution.[36] In effect, in the gas industry, the transportation function had already been unbundled from the retail sale of the gas.

In these circumstances, Congress sought to place all interstate transportation of natural gas under federal control.[37] In § 7 of the NGA, Congress imposed a certification requirement that was intended to work together with FERC's jurisdiction under NGA § 1(b).[38] NGA § 7(c) requires gas companies to obtain from FERC a certificate of public convenience and necessity before constructing or operating any facility for the transportation or making of any

[35] *See Cities of Aitkin v. FERC*, 704 F.2d 1254, 1257 n.4 (D.C. Cir. 1982) ("the natural gas industry is relatively unintegrated in comparison to the electric industry"); *see also* EDWARD KAHN, ELECTRIC UTILITY PLANNING AND REGULATION 16-21, 306-07 (1988) ("The natural gas industry is substantially less integrated than the electric utilities industry . . . The pipeline companies were the major developers of the gas industry, but they had relatively little corporate connection either to the local distribution companies or the gas suppliers."); JAMES C. BONBRIGHT, ET AL., PRINCIPLES OF PUBLIC UTILITY RATES 622 (1988) ("vertical integration is much less common than in the electric industry").

[36] Kahn, *supra* note 35, at 306-07.

[37] *See Hearings on H.R. 11662 Before House Committee on Interstate and Foreign Commerce*, 74th Cong. 56 (1936) (statement of Dozier A. DeVane, Solicitor, Federal Power Commission) ("The whole purpose of this bill is to bring under Federal regulation the pipe lines and to leave to the State commissions control over distributing companies and over their rates, whether that gas moves in interstate commerce or not.").

[38] *See Hearings on H.R. 11662 Before House Committee on Interstate and Foreign Commerce*, 74th Cong. 435 (statement of Chairman Lea) (1936) ("The gas industry is in a separate position from other utilities. There is greater reason for this provision [NGA § 7(c)] in the case of gas than electricity.").

jurisdictional sale.[39] There is no parallel certification requirement in the FPA.

The Commission and the courts concluded relatively early in the statute's history that the agency would have § 7(c) certificate authority over transportation for "direct sales"—which were typically sales of gas in large volumes and high pressure to industrial customers. *See Panhandle Eastern Pipe Line Co.*, 232 F.2d 467, 471-72 (3d Cir.), *cert. denied*, 352 U.S. 891 (1956). This was consistent with this Court's view that "transportation of natural gas in interstate commerce" encompassed movements in high-pressure pipelines. *East Ohio Gas Co.*, 338 U.S. at 472-73.

It was in this context that this Court decided *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 640-41 (1972). It upheld the Commission's power to curtail direct sales to industrial customers, sales that were already certificated pursuant to § 7 (*see id.* at 624). In order to give effect to the Commission's powers over transportation under § 7, the Court adopted a broad interpretation of the jurisdictional provision of the NGA, permitting the exercise of authority over transportation even when the sales themselves were exempt from FPC jurisdiction. The Court also relied directly on the legislative history of the NGA: "That rate setting was the only subject matter covered by [the exception for] 'sales' . . . is clear from the legislative history of the proviso." 406 U.S. at 639. Because *LP&L* focused on direct industrial sales and rested on the different structure and history of the Natural Gas Act, it is not an accurate guide to the treatment of other forms of retail transmission under the Federal Power Act. *Cf. Algonquin Gas Transmission Co. v. FERC*, 809 F.2d 136,

[39] This Court has also noted, "[T]he initial interest of Congress in regulation of transportation facilities was reemphasized in 1942 by passage of an amendment to § 7(c) of the Act broadening the Commission's powers over the construction or extension of pipe lines." *East Ohio Gas Co.*, 338 U.S. at 468.

142-43 & n.10 (1st Cir. 1987) ("[T]hat two different industries regulated under two different statutes must be treated exactly alike, is utterly unpersuasive.).[40]

If the NGA cases have any relevance here, at most they suggest that § 201(b) is susceptible to another interpretation than FERC adopted. These cases do not *compel* the reading urged by Enron. As the Court of Appeals pointed out, "[a] regulator could reasonably construe transmissions bundled with generation and delivery services and sold to a consumer for a single charge as either transmission services in interstate commerce or as an integral component of a retail sale." Pet. App. 35a. FERC's construction was reasonable in light of the language of the statute and its own distinctive history, which recognizes the role of the states in regulating all aspects of bundled retail sales. FERC's choice among reasonable interpretations is entitled to appropriate deference. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) ("[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.") (footnote omitted).

C. Regulation of Bundled Sales Is Not Necessary to Fulfill the Stated Objectives of Order No. 888.

Enron and its allies argue that, by failing to take jurisdiction over the interstate transmission component of bundled retail service, FERC left in place an unduly

[40] For example, in *LP&L*, this Court explained that curtailment of industrial customers (many of whom had alternative sources of supply) was necessary to assure fairness to residential customers whose sales were already being curtailed and who had no such options. 406 U.S. at 632. Here, Enron would invoke this case to achieve the opposite result—an expansion of federal jurisdiction to encompass bundled sales to residential customers who have no choice, so that Enron may make use of that transmission capacity in its own competitive transactions.

discriminatory situation that is inconsistent with its own stated objectives in issuing Order No. 888. They assert that public utilities have acted discriminatorily in providing transmission services to their own bundled retail customers in comparison with the services that they provide under the Order No. 888 open access tariffs. This argument fails for several reasons.

First, the argument puts the cart before the horse. The question before the Court is whether Congress granted jurisdiction to FERC to regulate the interstate transmission component of bundled retail service in the first instance. If FERC does not have such jurisdiction under the Federal Power Act, it is irrelevant whether, as a policy matter, FERC's failure to impose a remedy is adversely affecting Enron's interests as an unbundled transmission user in other markets. FERC's jurisdiction under FPA § 206 to eliminate undue discrimination applies to the facilities and services over which it has jurisdiction. It does not give the FERC unbridled authority to regulate services that are subject to exclusive State jurisdiction.

Second, FERC's findings of undue discrimination in Order No. 888 involved the potential for transmission-owning utilities to favor their own power sales in markets where the utilities must compete for those sales. FERC did not make factual findings in Order No. 888 that transmission-owning utilities engaged in undue discrimination against competitors with respect to the utilities' bundled retail sales, because there is no competition for such sales. A utility providing service to bundled retail customers generally has an exclusive state franchise to serve those customers, and a comparable finding of undue discrimination with respect to that endeavor is not even an abstract possibility.

Third, Enron focuses on a different issue—whether utilities in states adhering to the traditional model of bundled service have discriminated unduly in favor of transmissions to their

native load and against transmissions to customers receiving unbundled service in competitive power markets in other states. However, FERC did not make any specific findings of undue discrimination on this issue, and Enron did not appeal FERC's failure to make such findings.

In order for FERC to find that such discrimination exists under the Federal Power Act, it would first have to explore whether bundled retail customers are similarly situated to unbundled transmission customers, and whether any service differences are justified by the differences in customer characteristics.[41] FERC has previously recognized, and the reviewing court agreed, that bundled retail customers are *not* similarly situated with wholesale and unbundled retail customers. *See Northeast Utils. Serv. Co.*, 59 F.E.R.C. (CCH) ¶ 61,042, at 61,160 (1992), *aff'd*, 993 F.2d 937 (1st Cir. 1993); *cf. Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 299 (1997).

Bundled retail customers differ from those receiving unbundled service by the very fact that the former have no choice in service-providers. *See Northern States Power Co. v. FERC*, 176 F.3d 1090, 1095 (8th Cir. 1999) (most wholesale customers may use alternative supplies purchased from other utilities, whereas "[t]he native/retail consumer . . . is unable to turn to alternative sources of supply."), *cert. denied*, 528 U.S. 1182 (2000). As the Court recognized in *Tracy*, states might have various reasons for choosing to protect the residential customers who have no effective means

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[41] Undue discrimination under the Federal Power Act has long been defined as the disparate treatment of similarly situated FERC-jurisdictional customers. *E.g., Cities of Newark v. FERC*, 763 F.2d 533, 546 (3d Cir. 1985); *Metro. Edison Co. v. FERC*, 595 F.2d 851, 857 (D.C. Cir. 1979); *Pub. Serv. Co. of Ind., Inc. v. FERC*, 575 F.2d 1204, 1212 (7th Cir. 1978); *St. Michaels Utils. Comm'n v. FPC*, 377 F.2d 912, 916 (4th Cir. 1967). These precedents recognize that differences in customer characteristics may justify the imposition of different regulatory rules.

of choosing an alternative supplier. *See Gen. Motors Corp. v. Tracy*, 519 U.S. at 304-06. Indeed, traditional bundled service involves a "regulatory bargain," wherein the utility receives an exclusive franchise but assumes certain duties to its customers. "In return for this obligation to serve, the native load customers regularly bear the cost of transmission facilities; native load customers pay for them, use them, plan on them, and rely on them." *Northeast Utils. Serv. Co. v. FERC*, 993 F.2d 937, 954 (1st Cir. 1993); *see also* Order No. 888-A, 62 Fed. Reg. at 12,301. Thus, FERC has held that it is not discrimination when a utility providing service to its native load customers reserves transmission capacity for that purpose, and that view has been affirmed. *Id.*

The FERC also took concrete steps within the scope of its jurisdiction to address the concern of Enron and its allies that utilities will abuse their right to reserve transmission for their native load. FERC has consistently made clear that it will review a utility's available transmission capacity calculations, including the "set-aside" for bundled retail service (*i.e.*, for "native load"), to ensure that utilities do not arbitrarily withhold transmission capacity from the open access market. Thus, in several post-Order No. 888 cases, the FERC has reviewed utilities' transmission reservations for bundled retail load, and in some cases has ordered utilities to release capacity for use under open access tariffs.[42] FERC has also taken other steps to ensure that its supervision over reservations of capacity for the native load provides an

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[42] *E.g., Wisconsin Power & Light Co.*, 84 F.E.R.C. (CCH) ¶ 61,120, at 61,658-59 (1998); *El Paso Elec. Co.*, 87 F.E.R.C. (CCH) ¶ 61,202 (1999); *Arizona Pub. Serv. Co. v. Idaho Power Co.*, 87 F.E.R.C. (CCH) ¶ 61,303, at 62,223 (1999); *see also Capacity Benefit Margin in Computing Available Transmission Capacity*, Order Clarifying Methodology for Computing Available Transmission Capability, 88 F.E.R.C. (CCH) ¶ 61,099 (1999).

effective remedy.[43] And with respect to any capacity that is available for open access transmission, customers under the Order No. 888 open access tariff must receive the same degree of firmness as the utility's native load.[44] FERC has not left a jurisdictional void that utilities are able to use to unfairly restrict transactions in competitive markets.[45]

Lastly, Enron's brief seems to suggest that FERC should have exercised jurisdiction over bundled retail sales in order to facilitate retail competition in those States that have not volunteered to endorse this change. Enron Br. 34-38. Thus, it appears Enron may be using this jurisdictional dispute to help open up those retail markets for competition in order to obtain a broader customer base for its competitive services. As noted earlier, Congress has spoken to this question. Section 212(h) leaves to the States the question whether to require utilities to provide unbundled transmission services for retail customers. In the proper exercise of jurisdiction over matters of local concern, States may legitimately conclude that retail services should not be supplied competitively, and thus maintain their jurisdiction over all aspects of such services. It is this very choice that FERC correctly left to the States.

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[43] For example, FERC ruled that public utilities must identify their sources of generated or purchased power in order to permit other parties to ascertain whether the utilities' transmission set asides for bundled retail customers are reasonable. Order No. 888, 61 Fed. Reg. at 21,605.

[44] *Id.*

[45] Enron's amici raise various policy arguments about abusive or sham reservations for native load transmissions. These arguments belong before FERC or state commissions, not before the Court. Their concerns can and should be addressed through government policy. For example, a key objective of the Administration's recently announced energy plan is to expand transmission capacity to eliminate constraints on the grid. *See* Report of the National Energy Policy Development Group, "Reliable, Affordable, and Environmentally Sound Energy for America's Future," available at *www.whitehouse.gov/energy/ Overview*.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

Section 201 of the Federal Power Act, 16 U.S.C. § 824 provides in relevant part:

Declaration of policy; application of subchapter

(a) Federal regulation of transmission and sale of electric energy

It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) Use or sale of electric energy in interstate commerce

(1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the

transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(2) The provisions of sections 824i, 824j, and 824k of this title shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this chapter with respect to such provisions. Compliance with any order of the Commission under the provisions of section 824i or 824j of this title, shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.

(c) Electric energy in interstate commerce

For the purpose of this subchapter, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) "Sale of electric energy at wholesale" defined

The term "sale of electric energy at wholesale" when used in this subchapter, means a sale of electric energy to any person for resale.

Section 212(h) of the Federal Power Act, 16 U.S.C. § 824k(h), provides:

(h) Prohibition on mandatory retail wheeling and sham wholesale transactions

No order issued under this chapter shall be conditioned upon or require the transmission of electric energy:

(1) directly to an ultimate consumer, or

(2) to, or for the benefit of, an entity if such electric energy would be sold by such entity directly to an ultimate consumer, unless:

(A) such entity is a Federal power marketing agency; the Tennessee Valley Authority; a State or any political subdivision of a State (or an agency, authority, or instrumentality of a State or a political subdivision); a corporation or association that has ever received a loan for the purposes of providing electric service from the Administrator of the Rural Electrification Administration under the Rural Electrification Act of 1936 [7 U.S.C. § 901 *et seq.*]; a person having an obligation arising under State or local law (exclusive of an obligation arising solely from a contract entered into by such person) to provide electric service to the public; or any corporation or association which is wholly owned, directly or indirectly, by any one or more of the foregoing; and

(B) such entity was providing electric service to such ultimate consumer on October 24, 1992, or would utilize transmission or distribution facilities that it owns or controls to deliver all such electric energy to such electric consumer.

Nothing in this subsection shall affect any authority of any State or local government under State law concerning the transmission of electric energy directly to an ultimate consumer.

Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b), reads in pertinent part:

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals . . . Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the

Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

Sections 1(a) and (b) of the Natural Gas Act, 15 U.S.C. §§ 717(a), (b), provide:

Regulation of natural gas companies

(a) Necessity of regulation in public interest

As disclosed in reports of the Federal Trade Commission made pursuant to S.Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) Transactions to which provisions of chapter applicable

The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

Section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c), reads:

(c) Certificate of public convenience and necessity

(1)(A) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: Provided, however, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

(B) In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: Provided, however, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to

serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(2) The Commission may issue a certificate of public convenience and necessity to a natural-gas company for the transportation in interstate commerce of natural gas used by any person for one or more high-priority uses, as defined, by rule, by the Commission, in the case of—

(A) natural gas sold by the producer to such person; and

(B) natural gas produced by such person.

18 C.F.R. § 35.28, reads in relevant part:

Non-discriminatory open access transmission tariff.

(a) Applicability. This section applies to any public utility that owns, controls or operates facilities used for the transmission of electric energy in interstate commerce and to any non-public utility that seeks voluntary compliance with jurisdictional transmission tariff reciprocity conditions.

* * * *

(c) Non-discriminatory open access transmission tariffs.

(1) Every public utility that owns, controls or operates facilities used for the transmission of electric energy in interstate commerce must have on file with the Commission a tariff of general applicability for transmission services, including ancillary services, over such facilities. Such tariff must be the open access pro forma tariff contained in Order No. 888, FERC Stats. & Regs. ¶ 31,036 (Final Rule on Open Access and Stranded Costs) or

such other open access tariff as may be approved by the Commission consistent with Order No. 888, FERC Stats. & Regs. ¶ 31,036.

* * * *

(2) Every public utility that owns, controls or operates facilities used for the transmission of electric energy in interstate commerce, and that uses those facilities to engage in wholesale sales and/or purchases of electric energy, or unbundled retail sales of electric energy, must take transmission service for such sales and/or purchases under the open access tariff filed pursuant to this section.